No. 78-1239

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARSHALL P. SAFIR, PETITIONER

v.

ROBERT W. BLACKWELL, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioner brought this action in 1968 on behalf of himself and Sapphire Steamship Lines, Inc., against the Secretary of Commerce and two other Commerce Department officials. The complaint, filed in the United States District Court for the Eastern District of New York, sought mandamus, an injunction and a declaration to compel the defendants to enforce a decision of the Federal Maritime Commission against the Atlantic and Gulf American-Flag Berth Operators (AGAFBO), a conference of military cargo shippers. The Federal Maritime Commission had determined that, between 1965 and 1966, AGAFBO engaged in predatory reductions of shipping rates to the detriment of Sapphire Steamship Lines, in violation of the Shipping Act of 1916, 46 U.S.C. 814. As a result of that violation, petitioner alleged, AGAFBO members lost their right to receive subsidies under the Merchant Marine Act of 1936, 46 U.S.C. 1227. Petitioner

claimed that the Secretary should cease further subsidy payments to AGAFBO members and should compel them to repay all subsidies received while they engaged in conduct violative of the Act (Pet. App. 143a-149a).

The district court dismissed petitioner's complaint, but the Second Circuit determined that petitioner had standing to seek relief. *Safir* v. *Gibson*, 417 F. 2d 972 (2d Cir. 1969), cert. denied, 400 U.S. 850 (1970). The Second Circuit also determined that the Secretary was bound by the prior finding of the Federal Maritime Commission that the AGAFBO rate reductions were unreasonable. *Safir* v. *Gibson*, 432 F. 2d 137 (2d Cir.), cert. denied, 400 U.S. 942 (1970).[1]

In response to the mandate of the Second Circuit, the Secretary ordered partial repayment of subsidies received by certain AGAFBO members (Pet. App. 18a-19a). Petitioner sought review of that determination in the United States District Court for the District of Columbia, claiming that the Secretary must recover the full amount of the subsidies paid to all of the carriers during the period of the violation. The district court dismissed petitioner's complaint, but the court of appeals reversed and remanded for a determination whether the Secretary had abused her discretion. *Safir* v. *Kreps*, 551 F. 2d 447 (D.C. Cir.), cert. denied, 434 U.S. 820 (1977).[2]

In September 1977 petitioner moved to amend his original complaint in the Eastern District of New York. He sought to add a claim under the False Claims Act, 31 U.S.C. 231, alleging that the federal subsidy vouchers filed by AGAFBO members falsely

[1]Following this decision, the members of AGAFBO intervened (Pet. App. 18a-19a).

[2]Proceedings on remand in the district court are still pending.

represented that the members were in compliance with applicable statutory and contractual requirements.[3] The district court denied the motion to amend the complaint (Pet. App. 25a). The court held that petitioner's belated amendment could not "relate back" to the time of filing ot the original complaint under Fed. R. Civ. P. 15(c), pointing out the following (Pet. App. 37a):

> While * * * the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. * * * The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim.

The court of appeals affirmed (579 F. 2d 742; Pet App. 20a-21a).[4]

[3]The False Claims Act provides that under some conditions private parties may bring a civil action on behalf of the United States against a person who has presented a claim against the United States "knowing such claim to be false, fictitious, or fraudulent." 31 U.S.C. 231-235. The private plaintiff in such an action is designated a "relator," and the action is known as a "qui tam" proceeding. See generally *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 (1943).

[4]The court of appeals also affirmed the district court's dismissal of a new complaint filed by petitioner against the members of AGAFBO (Pet. App. 21a-24a). Petitioner has sought review of that decision in a separate petition (No. 78-1311). Petitioner's new complaint asserted a claim under the False Claims Act that is

2. The courts below correctly determined that petitioner could not file an amended complaint setting forth a new claim against new defendants nine years after filing his original complaint. The statute of limitations under the False Claims Act requires that claims be asserted "within six years from the commission of the act, and not afterward." 31 U.S.C. 235. Petitioner sought leave to amend his complaint in September 1977, more than 11 years after the shippers purportedly filed false claims for subsidies and more than six years after they received the subsidies sought to be recovered by the amended complaint.[5] Thus, the United States' right to recover under the False Claims Act accrued more than six years before the date on which petitioner sought to amend his complaint.

Petitioner's contention that the statute of limitations is inapplicable because of "fraudulent concealment" on the part of the shippers is unavailing. The limitations period in the False Claims Act is jurisdictional, and equitable tolling principles do not apply. See *United States* v. *Dawes*, 151 F. 2d 639, 644 (7th Cir. 1945), cert. denied, 327 U.S. 788 (1946); *United States* v. *Borin*, 209 F. 2d 145, 147-148 (5th Cir.), cert. denied, 348 U.S. 821 (1954). Moreover, the decision of the Federal Maritime Commission was filed in 1967, more than six years before petitioner attempted to amend his

similar to the claim contained in his proposed amended complaint. Pursuant to 31 U.S.C. 232(C), the United States declined to appear in that separate proceeding.

[5]Petitioner concedes that the subsidy payments sought to be recovered by the amended complaint were made more than six years before he attempted to plead a False Claims Act cause of action, and that his amendment strategy was adopted to avoid the limitations bar (Pet. 10; see also Pet. App. 20a n.3).

complaint. By then the problem was in the open, and further delay on petitioner's part was not excusable on this ground.[6]

Under these circumstances, the district court properly denied leave to file an amended complaint. The court had ample discretion to forbid this belated revival. See generally *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). Moreover, quite without regard to the exercise of discretion, the amendment was forbidden because it could not "relate back" to the date of the original filing under Fed. R. Civ. P. 15(c) unless the claim alleged in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." As the courts below correctly determined, petitioner's amended complaint contains a new claim for a new kind of relief resting on the new theory that the shippers defrauded the United States by filing false claims; the original claim rested on the theory that the United States breached its duty by failing to recover subsidies paid to shippers that had engaged in predatory pricing. Rule 15(c) does not permit petitioner to assert a new claim arising from a different breach of duty by different defendants. See, *e.g.*, *Barnes* v. *Callagan & Co.*, 559 F. 2d 1102, 1106 (7th Cir. 1977); *Rosenberg* v. *Martin*, 478 F. 2d 520, 526-527 (2d Cir.), cert. denied, 414 U.S. 872 (1973); *Young* v. *Pick Hotels-Washington Corporation*, 420 F. 2d 247, 248-249 (D.C. Cir. 1969).

[6]All of the essential facts were known to (or easily could have been learned by) petitioner in 1967. Petitioner referred to a possible qui tam action under the False Claims Act before the district court and the court of appeals in 1972. The decision not to pursue that claim until 1977 was petitioner's alone. See Pet. App. 19a n.2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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